STATE OF MICHIGAN

IN THE SUPREME COURT

BRUCE MILLAR,

Plaintiff/Appellant,

v.

CONSTRUCTION CODE AUTHORITY, CITY OF IMLAY CITY, and ELBA TOWNSHIP,

Defendants/Appellees.

Supreme Court Docket No.: 154437
Court of Appeals Docket No.: 326544
Lower Court Docket No.: 14-047734-CZ

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APPELLEE CONSTRUCTION CODE AUTHORITY'S RESPONSEIN OPPOSITION TO PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JUDGMENT APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

On September 15, 2016, Plaintiff submitted an Application for Leave to Appeal ("Application") the August 4, 2016 unpublished decision of the Michigan Court of Appeals which affirmed the Lapeer County Circuit Court's grant of Defendants' Motions for Summary Disposition. *Millar v Construction Code Authority, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, decided August 4, 2016 (Docket No. 326544). The Court of Appeals' decision arose out of Plaintiff's appeal of the Lapeer County Circuit Court's Order Granting Defendants' Motions for Summary Disposition, which was signed by the Honorable Nick O. Holowka of the Lapeer County Circuit Court on March 19, 2015 in Case No. 14-047734-CZ.

Defendant Construction Code Authority ("CCA") states that this Court should reject jurisdiction in this matter because Plaintiff's Application: (1) fails to present any issues of significant public interest, MCR 7.302(B)(2); (2) fails to present any legal principles of major significance to the state's jurisprudence, MCR 7.302(B)(3); and (3) the decision of the Court of Appeals was not clearly erroneous and does not conflict with a Supreme Court decision or another Court of Appeals decision. MCR 7.302(B)(5). To the contrary, the trial court and Court of Appeals' decisions correctly applied and are consistent with the established law of the State of Michigan.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. **WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION TO DEFENDANT CONSTRUCTION CODE AUTHORITY ("CCA") BECAUSE PLAINTIFF FAILED TO TIMELY FILE A CLAIM ASSERTING A VIOLATION OF MICHIGAN'S WHISTLEBLOWERS' PROTECTION ACT ("WPA") WHEN HE FAILED TO FILE HIS LAWSUIT WITHIN 90 DAYS OF THE DATE OF THE ALLEGED ADVERSE EMPLOYMENT ACTION THAT PRECIPITATED HIS CLAIM.**

   The Trial Court Answers: "Yes"

   The Court of Appeals Answers:"Yes"

   Defendant-Appellee Construction Code Authority Answers: "Yes"

   Plaintiff-Appellant Answers: "No"

2. **WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'SGRANT OF SUMMARY DISPOSITION TO DEFENDANT CCA AS TO PLAINTIFF'S PUBLIC POLICY CLAIM BECAUSE PLAINTIFF'S CLAIM IS PREEMPTED BY THE WPA.**

   The Trial Court Answers: "Yes"

   The Court of Appeals Answers:"Yes"

   Defendant-Appellee Construction Code Authority Answers: "Yes"

   Plaintiff-Appellant Answers: "No"

3. **WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'SGRANT OF SUMMARY DISPOSITION TO DEENDANT CCA ON THE BASIS THAT PLAINTIFF'S CIVIL CONSPIRACY CLAIM IS NOT AN INDEPENDENTLY ACTIONABLE TORT CLAIM.**

   The Trial Court Answers: "Yes"

   The Court of Appeals Answers:"Yes"

   Defendant-Appellee Construction Code Authority Answers: "Yes"

   Plaintiff-Appellant Answers: "No"

I. INTRODUCTION AND COUNTER-STATEMENT OF FACTS

A. Factual Background.

This Application arises out of Plaintiff's three count employment lawsuit in which Plaintiff asserted violations of Michigan's Whistleblowers' Protection Act ("WPA") and public policy as well as a claim alleging civil conspiracy. After Defendants filed motions for summary disposition, the trial court properly determined that (1) Plaintiff's WPA claim was time-barred under Michigan law; (2) that Plaintiff's tort claims are barred by governmental immunity; and (3) that his public policy claim was preempted by the WPA. Accordingly, the trial court properly granted summary disposition to Defendant CCA pursuant to MCR 2.116(C)(7) and (C)(8). Following the trial court's decision, Plaintiff filed a claim of appeal to the Michigan Court of Appeals, which affirmed the trial court's decision in its entirety.

Plaintiff was employed as an inspector with Defendant CCA. CCA is a multi-governmental inspection and development control agency serving cities, townships and villages in Lapeer County and surrounding counties. The CCA was formed through an interlocal agreement between member communities under the authority of the Michigan Urban Cooperation Act of 1967. CCA provides inspection and code enforcement services to its active municipal clients in the areas of building, zoning, addressing, plumbing, mechanical, electrical, fire prevention and rental. (Ex. 1 Complaint, Ex. B, p. 4).[1]

Plaintiff alleged that CCA retaliated against him on March 27, 2014, when CCA directed him to stop performing inspections for Elba Township ("Township") and Imlay City ("City"), two member municipalities. (Ex. 1 Complaint, ¶18). The March 27, 2014 letter states:

I regret to inform you that [the Township and City] no longer wish for you to act

[1]References to exhibits are those exhibits which are already part of the record and submitted in support of CCA's response in opposition to Plaintiff's appeal to the Michigan Court of Appeals.

> as their plumbing and mechanical official and request that you **immediately** cease conducting all mechanical and plumbing inspections within their communities.

(Ex. 1 Complaint, Ex. D) (emphasis added). Plaintiff asserted that, as a result of this letter, he was terminated from working as a plumbing and mechanical and/or fire inspector in the City and Township. (Ex. 1, Complaint, ¶25). CCA's March 27, 2014 letter resulted from communications it received from the Township and City, each requesting that Plaintiff no longer provide inspection services to their municipalities. The Township made its request by letter dated March 11, 2014. The City made its request in a March 20, 2014 letter to CCA.

B. Procedural History.

On February 9, 2015, CCA filed its motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). In the motion, CCA asserted that Plaintiff's public policy and civil conspiracy tort claims were barred by governmental immunity such that CCA was entitled to summary disposition of those claims pursuant to MCR 2.116(C)(7). CCA further asserted that Plaintiff's public policy tort claim was preempted by the WPA because both claims are based on the same factual scenario and that, therefore, Plaintiff's Complaint failed to state a claim upon which relief could be granted and that summary disposition was appropriate pursuant to MCR 2.116(C)(8). Finally, CCA asserted that Plaintiff's WPA claim was time barred because he did not file his lawsuit within the WPA's 90 day statutory limitations period and that Plaintiff's Complaint failed to state a claim under the WPA upon which relief could be granted. Therefore, CCA wasentitled to summary disposition of this claim pursuant to MCR 2.116(C)(8).

On March 2, 2015, the trial court held a hearing on CCA's dispositive motion as well as the dispositive motions filed by Defendants City and Township. After hearing arguments from counsel for Defendants and Plaintiff, the trial court correctly granted Defendants' motions. The trial court entered an order granting Defendants' dispositive motions on March 19, 2015.

Plaintiff then appealed the trial court's ruling to the Michigan Court of Appeals on the basis that the trial court incorrectly granted summary disposition. On August 4, 2016, the Court of Appeals affirmed the trial court's decision in its entirety. As to Plaintiff's WPA claim, the Court of Appeals determined:

> In essence, plaintiff alleged that CCA, acting in accord with the directives of the City and Township, terminated his employment in retaliation for his reporting various code violations. Plaintiff argues that the 90 day time deadline started on the day that he received the letter – i.e. March 31, 2014. However, a claim accrues at 'the time the wrong upon which the claim is based was *done* regardless of the time when damage results.' *Joliet*, 475 Mich at 36. Here, the alleged wrong occurred when the City and Township wrote the letters to the CCA directing the CCA to terminate plaintiff allegedly in retaliation for his protected activity. In other words, while damages resulted when plaintiff received the letter, the wrong upon which plaintiff's claim is based occurred when the City and Township terminated plaintiff in retaliation for his protected activity – i.e. March 11, 2014 and March 20, 2014. Therefore, plaintiff was required to commence his WPA action within 90 days of those dates. Plaintiff failed to do so. Instead, plaintiff filed his complaint on June 26, 2014, 107 and 98 days respectively after the allegedly wrongful conduct took place. Moreover, even if we were to assume that CCA's conduct was the allegedly wrongful conduct that commenced the 90 day clock, plaintiff filed his complaint 91 days after CCA's alleged wrongful act – i.e. termination of plaintiff's assignments in the City and the Township on March 27, 2014.

Millar, *supra* at 6. As to Plaintiff's public policy claim, the Court of Appeals affirmed the trial court's dismissal of this claim as well, stating:

> Although plaintiff argues that his public policy claim is distinct from his WPA claim and contends that the claims involve various complex factual allegations, a review of the complaint shows that the crux of both claims arise from the same alleged wrongful conduct – i.e. retaliatory termination for reporting various code violations. . . [T]herefore, although plaintiff failed to meet the WPA's limitations period, plaintiff's wrongful termination/public policy claim was preempted by the WPA and was not sustainable and the trial court did not err in dismissing the claim.

Millar, *supra* at 7-8. Finally, the Court of Appeals correctly determined that Plaintiff's civil conspiracy claim could not go forward. While Plaintiff asserts that he has repeatedly sought to amend his complaint, he did not file a motion in any court seeking an amendment or setting forth

the reasons why such a request should be granted. Therefore, Plaintiff's appeal asserting an entitlement to amend his complaint is not properly before this Court.

II. LEGAL STANDARD

The Court of Appeals affirmed the trial court's grant of summary disposition. Decisions on a summary disposition motion are reviewed de novo. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002). "A motion under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *McDowell v City of Detroit*, 264 Mich App 337, 345-346; 690 NW2d 513 (2004)."If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce v Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005).

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

III. ARGUMENT

A. The Court Of Appeals Correctly Determined That Plaintiff Did Not State Any Claims Against CCA.

1. This Court Has Definitively Established That A Plaintiff Must Comply With The WPA's 90 Day Limitations Period.

The WPA provides:

> A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

MCL 15.363(1). Whether a claim is barred by a statutory limitations period is a question of law.

Joliet v Pitoniak, 475 Mich 30, 35; 715 NW2d 60 (2006). Michigan courts have determined that "[t]he language of the WPA unambiguously requires claims to be made" within 90 days after the occurrence of the alleged violation of the act. *Moyer v Comprehensive Rehab. Ctr.*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 292061 (decided September 16, 2010). (Ex. 2). Plaintiff's attempt to expand the statutory limitations period is not supported by the WPA, any relevant or applicable citation to Michigan law or any evidence in the record. In fact, this Court has also already determined that to allow recovery for a claim that was not made within 90 days of the occurrence of the WPA violation "is simply to extend the limitations period beyond that which was expressly established by the Legislature." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 282; 696 NW2d 646 (2005).

This Court has explained that courts must follow the plain and unambiguous language of a statute, like the WPA's unambiguous 90 day statutory limitations period. *Kimmelman v Heather Downs Mgmt Ltd*, 278 Mich App 569, 574-575; 753 NW2d 265 (2008) (citing *People v McIntire*, 461 Mich 147, 155-158 & n 2; 599 NW2d 102 (1999)). In considering statutory language, courts have an obligation "to discern and give effect to the . . . intent as expressed in the words of the statute." *Electronic Data Sys Corp v Twp of Flint*, 253 Mich App 538, 545; 656 NW2d 215 (2002). The focus of the inquiry centers on the words of the statute, as they provide the most reliable evidence of intent. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). A court does not interpret a statute in a way that renders any statutory language "surplusage or nugatory." *Pohutski v Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002). Such a rendering of the

WPA's unambiguous 90 day limitations period is precisely what Plaintiff is seeking on appeal.

"The fundamental rule of construction of statutes is to ascertain and give effect to the intention of the Legislature; courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction. . . ." *Covell v Spengler*, 141 Mich App 76, 81; 366 NW2d 76 (1985). With respect to the WPA, this Court has already determined that the language in the WPA is unambiguous. *Kimmelman, supra*.

The WPA's 90 day timeframe is a statute of limitations and if it is not met, it bars a plaintiff's action. *Id.* In *Covell, supra*, the plaintiff asserted that the WPA's 90 day statute of limitations should be disregarded because it is unduly and unconstitutionally short. A panel of the Court of Appeals disagreed, stating that the Legislature may place reasonable restrictions on the exercise of a right, including specific time limitations. *Id*. at 81-82 (citing *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978)). The Court further noted that statutes of limitation are generally considered to be procedural requirements and that, as such, "they are upheld by our courts unless it can be demonstrated that they are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *Id*. (citing *Forest, supra*). The *Covell* Court disagreed that the WPA's 90 day limitation period was harsh or unreasonable and upheld the trial court's decision to dismiss the plaintiff's WPA claim. *Id.* Accordingly, pursuant to Michigan law, a plaintiff has 90 days to file a WPA claim from the date an alleged adverse employment action took place.

2. The Court of Appeals Correctly Determined That Plaintiff Filed His Complaint Outside The WPA's 90 Day Statutory Limitations Period.

Plaintiff asserts that this Court should not apply its holding in *Joliet* because *Joliet* relates to a claim brought under Michigan's Elliott Larsen Civil Rights Act ("ELCRA") and not the WPA. This is irrelevant, as *Joliet* establishes the time in which a claim accrues based on an

adverse employment action. Further, the actual limitation period associated with either an ELCRA or WPA claim is irrelevant. In *Joliet*, the plaintiff asserted that she was subjected to harassment based on her gender in violation of the ELCRA. During the period of alleged harassment, the plaintiff went on vacation on November 24, 1998. While on vacation the plaintiff decided that she could no longer work for the defendant. She sent her resignation to the employer on November 30, 1998, to be effective December 1, 1998. In filing her lawsuit against the defendant, the plaintiff asserted that she was constructively discharged because of the alleged harassment and that her claim accrued on the December 1, 1998, the effective date of her resignation, rather than the earlier date when she went on leave. The plaintiff filed her lawsuit outside the statutory three year limitations period and asserted that her claim accrued on the later date in order to demonstrate that she timely filed the lawsuit. *Id.* at 36-39.

The trial court denied the defendants' motion for summary disposition, concluding that the plaintiff had three years from the last day that she worked, which was sometime between November 30, 1998, and December 1, 1998, to file her lawsuit. A panel of the Court of Appeals affirmed the order denying defendants' motion for summary disposition, finding that the plaintiff's last day of work was November 30, 1998. This Court then reversed the trial court and the Court of Appeals and determined that accrual under the three-year statute of limitations is measured by "the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id*. at 36-39 (emphasis added). The Court then determined that the plaintiff did not timely file her lawsuit, as all the discriminatory acts or misrepresentations alleged in the plaintiff's complaint took place before November 30, 1998. Thus, the plaintiff's November 30, 2001 complaint was not timely filed and the trial court and Court of Appeals erred

in denying the defendants' motion for summary disposition based on the three-year period of limitations. *Id*. at 45.

Plaintiff asserts several reasons why the Court should not apply *Joliet*in the instant matter, none of which is relevant. Importantly, Plaintiff seems to assert that the trial court and Court of Appeals somehow created a date when the adverse employment action took place. This is false. All dates referenced in the lower courts' decisions are based on Plaintiff's own factual allegations, which Plaintiff cannot possibly contest, as they are based on his own assertions. (See Complaint at ¶18; Ex. D to Complaint). Therefore, Plaintiff's assertion that any court relied on false or questionable information is false.

Plaintiff also asserts that *Joliet* is not applicable in the instant case because it involved a different limitations period. (Application at 19). However, that is irrelevant, as the holding in *Joliet* is about when a claim accrues, not the length of a statutory limitations period. Regardless, the holding in *Joliet* demonstrates that the law in Michigan is that a plaintiff's claim accrues on the date that the discriminatory or retaliatory conduct takes place and not when the damage is perceived. Therefore, Plaintiff's attempt to distinguish *Joliet* is incorrect, and *Joliet* supports the trial court's correct dismissal of Plaintiff's WPA claim and the Court of Appeals decision affirming the dismissal.

In contrast to the *Joliet* decision, Plaintiff asserts that the Township and City's letters regarding Plaintiff were somehow not adverse employment actions. (Application at p. 15). This is false and Plaintiff cites to no applicable Michigan authority to support this assertion. Instead, Plaintiff relies on *Niezgoski v Quality Home Care, Inc,* unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 250385 (decided January 27, 2015) (Ex. 3) and *Collins v Comerica Bank*, 468 Mich 628; 664 NW2d 713 (2003)for the incorrect proposition that an

employee's claim accrues on the date he or she is notified of a termination. *Niezgoski* does not support this conclusion. The holding in *Niezgoski* merely reiterates that of *Collins, supra*, which states that where a decision on an employee's employment status has not been made, a claim accrues on the date the employee is notified of a decision. *Collins, supra*. In the instant matter, there is no question when a decision was made regarding whether Plaintiff would continue to provide services to the City and Township. That decision was unquestionably made on March 27, 2014. Therefore, the holding in *Collins* is inapplicable, irrelevant and provides no support for Plaintiff's position on appeal. Plaintiff's reference to other Michigan decisions relating to the WPA provide no basis for the Court to even question the Court of Appeal's determination, as the holdings in those cases have nothing to do with the present issue, which is the application of the holding in *Joliet* to bar Plaintiff's WPA claim as untimely.

In particular, Plaintiff asserts that *Wurtz v Beecher Metro Dist*, 495 Mich 242; 848 NW2d 121 (2014) somehow defeats Defendants' position. This is false. In *Wurtz*, this Court stated only that an adverse employment action pled in support of a WPA violation claim must be one of the enumerated actions set forth in the WPA. *Id*. at n14. Here, Plaintiff asserts that he was discharged from employment with the Township and City. The only issue on appeal is whether Plaintiff timely filed his WPA claim following this discharge. The *Wurtz* decision has no bearing on this issue.

Based on Plaintiff's own allegations, the Township and City undisputedly prepared letters to Plaintiff on March 11, 2014 and March 20, 2014 and CCA communicated the content of those letters to Plaintiff on March 27, 2014, stating that Plaintiff would no longer provide inspection services to the City or the Township. (*See* Complaint). Further, Plaintiff undisputedly filed his complaint on June 26, 2014, 91 days after March 27, 2014 and 107 and 98 days following the

City and Township's letters. Nevertheless, Plaintiff asserts on appeal that his claim arose when he learned about the letters on March 31, 2014. This conclusion is not only incorrect, it is completely unsupported by Michigan law and Plaintiff has cited no legal authority supporting his position. In fact, Plaintiff's entire basis for challenging the Court of Appeals' decision is based on his irrelevant and misplaced interpretation of and reference to Michigan law. Plaintiff's incoherent assertions on appeal do nothing to challenge or even question the Court of Appeal's correct decision to affirm the trial court's dismissal of Plaintiff's WPA claim based on his failure to meet the 90 day statute of limitations. Plaintiff's assertion that the date on which he received CCA's letter as opposed to the date on which CCA took action is irrelevant. Michigan law unquestionably holds that the date Plaintiff learned of the letter is irrelevant. Therefore, Plaintiff has presented no basis upon which this Court should consider, let alone, reverse, the Court of Appeals' decision. Accordingly, his Application should be denied.

3. Plaintiff Incorrectly Asserts That The Conduct of The Township and The City Is Irrelevant.

Plaintiff's assertion that the Court of Appeals incorrectly considered all Defendants to be Plaintiff's employer is wrong. Further, this directly contradicts Plaintiff's allegations in his own Complaint. Indeed, it is the only basis upon which Plaintiff could pursue claims against the City and Township, as the WPA provides no basis for asserting claims against them unless they are his employer. MCL 15.362 provides only that an "employer" is prohibited from engaging in certain allegedly retaliatory conduct. Accordingly, Plaintiff must assert that the Township, City and CCA are each and all his employer in order to assert claims against them. Plaintiff asserts that the Township and City each exert a high degree of control over CCA's Board of Trustees, such that each is his employer for purposes of the WPA. (Complaint at ¶24). Therefore, as the Court of Appeals' determination regarding the identity of Plaintiff's employer is based on

Plaintiff's own allegations and, in fact, Plaintiff can only pursue a WPA claim against Defendants on this basis. Therefore, the Court of Appeals correctly determined that Plaintiff's 90 day statutory limitations period was triggered by letters from the Township and City. Despite the Court of Appeals' reliance on Plaintiff's own allegations, Plaintiff asserts that Defendants cannot rely on the dates on which the Township and City provided letters terminating his services with them. Plaintiff provides no legal support for this assertion and it otherwise provides no basis upon which this Court should examine or reverse the Court of Appeals' determination.

In attempting to support his incorrect assertion, Plaintiff refers to the "discovery rule" discussed in *Trentadue v Gorton*, 479 Mich 378; 738 NW2d 664 (2007), in relation to a death or injury case, and the statutory limitations period contained in MCL 600.5825 relative to "joint obligors." Plaintiff's reference to this information is inapplicable to this matter, as they are only relevant in the specific facts at issue in the respective circumstances. Further, as the WPA contains a specific reference to a limitations period and when that period is triggered, consideration of *Trentadue* and MCL 600.5825 is neither necessary nor appropriate. Plaintiff has provided no basis for consideration or reversal of the Court of Appeals' correct decision affirming the trial court's dismissal of Plaintiff's claims. Therefore, Plaintiff's Application should be denied.

B. The Court of Appeals Properly Affirmed The Trial Court's Dismissal of Plaintiff's Public Policy Claim.

Plaintiff's WPA and public policy claims assert the same allegations, that Plaintiff was "discharged" for failing or refusing to violate the building and construction codes. (Ex. 1, Complaint, ¶25-26, 35-36). Contrary to Plaintiff's assertions in his Application, the number of alleged activities which form the basis for the allegations is irrelevant pursuant to Michigan law.

Regardless of the number of activities pled, a public policy claim is sustainable only where there exists no "applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 80; 503 NW2d 645 (1993). In Michigan, the remedies provided by the WPA are exclusive and not cumulative. *Id*. at 79. Because Plaintiff's allegations asserted in support of his public policy and WPA claims are the same, his public policy claim is preempted by the WPA and the trial court properly granted summary disposition to CCA for this claim.

Plaintiff incorrectly asserts that because the trial court and Court of Appeals determined that Plaintiff's WPA claim was untimely, the WPA does not apply to Plaintiff's claim and does not preempt the public policy claim. Plaintiff is incorrect. In support of this position, Plaintiff cites to *Driver v Hanley*, 226 Mich App 225; 575 NW2d 31 (1997). *Driver* does not support Plaintiff's assertion. Rather, in *Driver*, the court determined that the WPA did not apply to the plaintiff's claim at all because the plaintiff did not report a violation of the law to a public body. *Id*. at 562-63. Therefore, in *Driver*, the WPA could not possibly have applied to the plaintiff's claim, the only appropriate claim for the plaintiff to have filed was the public policy tort claim and there was no applicable statutory violation that the plaintiff could have pled. The instant case is completely dissimilar to *Driver*. In the instant case the trial court did not determine that the WPA did not apply. Rather, the trial court determined that Plaintiff did not comply with the WPA's 90 day statutory limitations period.

This case is consistent with *Kimmelman*, *supra*, in which the Court of Appeals affirmed summary disposition in favor of the defendant employer for the plaintiff's public policy claim on the basis that the WPA was the employee's exclusive remedy. Further, in *Kimmelman*, the plaintiff failed to comply with the WPA's 90 day statutory limitations period but the court still

upheld summary disposition of the public policy claim. *Kimmelman, supra* at 572. Accordingly, even though Plaintiff in the instant case failed to comply with the WPA's statutory limitations period, the WPA remains Plaintiff's exclusive remedy. *Id.* Therefore, the WPA preempts Plaintiff's public policy claim, and the Court of Appeals correctly affirmed the trial court's dismissal of Plaintiff's public policy claim.

In support of his position, Plaintiff also cites to *Pace v Edel-Harrelson*, 499 Mich 1; 878 NW2d 784 (2016). Although in *Pace*, this Court reinstituted the plaintiff's public policy claim, it did so only because it also determined that the plaintiff failed to assert that she engaged in conduct protected by the WPA. Therefore, the Court determined that, as there was no valid WPA claim pled, the plaintiff's public policy claim could go forward. The *Pace* determination is critically distinguishable from the instant matter. Here, the lower courts determined only that Plaintiff failed to meet the WPA's 90 day statutory limitations period and dismissed the WPA claim on that basis. Neither court determined, as the Court did in *Pace*, that Plaintiff failed to allege that he engaged in activity protected by the WPA.

Contrary to Plaintiff's assertion, the Court of Appeals did much more than simply examine the headings in Plaintiff's Complaint. Indeed, the court stated "a review of the complaint shows that the crux of both claims arise from the same alleged wrongful conduct – i.e. retaliatory termination for reporting various code violations." (Opinion at 7). Therefore, the court engaged an appropriate review of Plaintiff's allegations in reaching its decision. Accordingly, based on the distinction between *Pace* and the instant matter, and the Court of Appeals' analysis of Plaintiff's allegations, *Pace* has no bearing on the instant case and provides

no basis for this Court to even question the Court of Appeals' correct decision affirming the trial court's dismissal of Plaintiff's public policy claim.[2]

C. Plaintiff Has Not Sought Leave To Amend The Complaint, But Even If He Had, Such A Request Would Be Futile.

Contrary to Plaintiff's assertion in the Application, Plaintiff has never sought leave of any court to amend his Complaint. However, had Plaintiff made such a request, amendment would have been futile. Based upon Plaintiff's failure to timely file his Complaint, no amendment could alter this outcome. Regardless, Plaintiff has never filed a motion to amend his Complaint. Therefore, Plaintiff has provided no basis for doing so, cited no law in support of an amendment, and has provided no proposed amended allegations such that the parties could even provide a meaningful response.

A motion to amend ordinarily should be granted or denied only for particularized reasons. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

> In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Id. (quoting *Foman v Davis*, 371 US 178, 182 (1962)). Here, though Plaintiff asserts that both the trial court and Court of Appeals disregarded his requests for leave to amend, Plaintiff did not file a motion for leave to amend in either the trial court or Court of Appeals. Therefore, Plaintiff has provided no basis for seeking leave to amend. He has not asserted how an amendment would alter, correct or bolster any of his claims. In particular, Plaintiff has never asserted how

[2]Plaintiff's reference to *Landin v Healthsource Saginaw, Inc.* 305 Mich App 519; 854 NW2d 152 (2014) is distinguishable for the same reason. In *Landin*, the court determined only that the plaintiff's claim was not based on a violation of the WPA but malpractice. Therefore, like *Pace*, *Landin* provides no support to Plaintiff's position in the instant matter and Plaintiff's Application should be denied.

amendment of the Complaint would lead to a different result in the trial court, the Court of Appeals or this Court. As Plaintiff has provided no basis for any court to grant leave to him to amend his Complaint, Plaintiff has presented no basis for this Court to question, alter or reverse the Court of Appeals' correct decision affirming the trial court's dismissal of his claims. Accordingly, Plaintiff's Application should be denied.

IV. CONCLUSION

WHEREFORE, Defendant Construction Code Authority respectfully requests that this Court deny Plaintiff's Application for Leave to Appeal, affirm the Court of Appeals' August 4 2016 order affirming summary disposition in Defendant's Construction Code Authority's favor and grant any other relief the Court deems just and appropriate.

Respectfully submitted,

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